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CHARLES ELMORE CROP

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, a Corporation,

Petitioner,

v.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, TRUSTEES,

Respondents.

BRIEF FOR PETITIONER

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decisions of the Circuit Courts of Appeals for the Sixth, Eighth and Second Circuits on the same matter and to the rule recognized in the Third Circuit.

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AUTHORITY:

Remington on Bankruptcy (4th ed.) sec. 502; id. sec. 1067; id. sec. 3859 20

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Respondents.

BRIEF FOR PETITIONER

OPINION BELOW

The District Court delivered no written opinion. The opinion of the Circuit Court of Appeals (R. 58) is reported in 84 F. (2d) 965.

JURISDICTION

The decree of the Circuit Court of Appeals was entered July 4, 1936 (R. 60). The petition for

certiorari was filed August 22, 1936, and granted October 12, 1936. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. A. Sec. 347.

QUESTION PRESENTED

The single question in this case is whether the District Court had power (jurisdiction) to set aside its order dismissing petitions for corporate reorganization filed by petitioner under Section 77-B of the Bankruptcy Act, and to grant a rehearing of the questions arising upon the objections of the respondents to said petitions, after the expiration of the thirty-day period allowed for appeal from that order by Section 25(a) of the Bankruptcy Act. (Act of July 1, 1898, c. 541, sec. 25, 30 Stat. 553; Act of May 27, 1926, c. 406, sec. 10, 44 Stat. 665; 11 U. S. C. A. Sec. 48).*

STATEMENT

Petitioner on November 25, 1935, filed in the District Court of the United States for the Southern District of West Virginia its original petition (R. 1), and on the 10th day of December, 1935, its amended and supplemental petition (R. 1) for corporate reorganization under Section 77-B of the Bankruptcy Act as amended.[1]

* Sections 24 and 25 of the Bankruptcy Act are quoted in full in Appendix A and the relevant parts of Section 77-B in Appendix B, hereto.

[1] The original and amended petitions are incorporated in petitioner's second amended and supplemental petition, post, found at p. 25 of the Record.

(Act of June 7, 1934, 48 Stat. 911, as amended by Act of August 20, 1935, c. 577, 49 Stat. 965, as amended by Act of August 29, 1935, c. 809, 49 Stat. 965; 11 U. S. C. A. Sec. 207).

February 7, 1936, respondents filed their joint and separate objections to the approval of said petitions and motions to dismiss them. (R. 1, 2).

By order entered March 2, 1936, the District Court held that said petitions and the plan of reorganization set out and described therein did not present a feasible method of reorganizing the debtor (this petitioner) and did not adequately or fairly provide for the protection of the rights of the holders of the first mortgage bonds of the debtor or for the realization by them of the value of their interests or liens; that the holders of more than 92 per cent of said bonds (the respondent Glass Companies) had refused to approve or accept said plan, and that said petitions did not comply with the provisions of Section 77-B of the Bankruptcy Act, and therefore were not filed in good faith within the meaning of said Act. It accordingly disapproved and dismissed said petitions. (R. 3).

Petitioner, desiring to appeal from this order, on March 20, 1936, filed its petition for appeal under Section 24(b) of the Bankruptcy Act in the office of the Clerk of the Circuit Court of Appeals for the Fourth Circuit, together with its assignment of errors and other requisite papers, that court then being in

vacation. On the first day of the first term of said court following the filing of said petition, April 6, 1936, petitioner appeared before the court and submitted its petition for such appeal, which the respondents resisted. (R. 10). By its order entered April 15, 1936, (R. 10) the Circuit Court denied the appeal; upon the ground that the order of the District Court dismissing the petitions for reorganization was the equivalent for procedural purposes of a judgment refusing to adjudge petitioner a bankrupt and was reviewable only by appeal under Section 25(a) of the Bankruptcy Act, to be obtained by application to a Judge of the District Court. The Circuit Court held that the methods of review in bankruptcy by appeal under Section 25(a), and by supervisory appeal under Section 24(b) are mutually exclusive, and that the latter cannot be granted in the court's discretion in cases which are reviewable by appeal as of right by the former procedure. *Wayne United Gas Company* v. *Owens-Illinois Glass Company et al.*, (C. C. A. 4th) 83 F. (2d) 98.

Two days thereafter, April 17, 1936, petitioner notified respondents that on April 24th it would present to the District Court its petition praying that the order of March 2, 1936, be vacated and that a rehearing and review of all matters arising in said proceeding be awarded petitioner because of alleged errors committed by the court in dismissing its petitions for reorganization, set forth in an assignment of errors tendered with said petition (R. 4), and that

upon rehearing an order be entered by the District Court awarding petitioner the relief prayed in its original and amended petitions.

By order made April 24, 1936, the District Court directed said petition for rehearing to be filed, and after hearing argument of counsel thereon, took time to consider its judgment. (R. 4). By order entered May 12, 1936, the District Court set aside its order of March 2, 1936, and granted the rehearing and review prayed by petitioner, setting May 22, 1936, for a hearing "on all questions arising on the record." The District Court found "that good cause exists justifying this court in the exercise of a sound judicial discretion in setting aside, vacating and annulling" the order of March 2, 1936, "and in granting to the said Wayne United Gas Company, the above named debtor, a rehearing of all the issues and matters arising in the above styled proceeding upon the alleged errors set forth in the assignment of errors presented with the aforesaid petition and upon the record in this proceeding." (R. 18). The court also found that the debtor's petition and motion to vacate said order of March 2, 1936, and for a rehearing of the matters decided thereby "have been properly and seasonably presented in this cause, and that no rights have become vested under said order * * *" of March 2, 1936, "which will be disturbed by the vacation of said order * * *." (R. 18).

In its order of May 12th, upon motion of respondents, the District Court certified that a regular term

began at Charleston, where the court was sitting, on April 21, 1936. (R. 19).

On May 22, 1936, petitioner, by leave of court, filed its second amended and supplemental petition for reorganization under 77-B (R.25), which incorporated in full its first amended and supplemental petition (R. 26), which latter had incorporated the original petition. Thereupon petitioner moved the court to approve its said petitions, to find that they were filed in good faith and in compliance with the requirements of Section 77-B, *and to set a day for a hearing upon the plan of reorganization which petitioner would then submit to the court*, to be substantially as set out in its second amended and supplemental petition. (R. 21). The respondents appeared and resisted petitioner's motion upon this rehearing.

By order entered May 28, 1936, (R. 19-24) the District Court, after full argument, overruled petitioner's motions and sustained respondents' objections to said petitions and disapproved and dismissed the same for reasons expressed in numerous findings of fact and law made by the court, contained in said order. (R. 21).*

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* Petitioner objected to most of these findings upon the ground, among others, that they dealt with and decided matters which could be presented and developed only upon a hearing upon the plan of reorganization outlined in its second amended petition, provided for by Subd. (c) of Sec. 77-B, and that such findings were not warranted by the record as then constituted, or proper at the stage of the proceedings in this cause then before the Court. (R. 24).

June 11, 1936, petitioner's petition to the Judge of the District Court for an appeal under Section 25(a) of the Bankruptcy Act from said decree of May 28, 1936, to the Circuit Court of Appeals for the Fourth Circuit, with supersedeas, was granted by the Judge of the District Court and duly perfected. (R. 62).

On July 1st the motion of the appellees, Owens-Illinois Glass Company and others (the respondents here), to dismiss said appeal was argued before the Circuit Court, which by decree entered July 4th sustained the motion and dismissed the appeal (R. 60), upon the ground that the District Court was without *power* to grant a rehearing and set aside the order of March 2nd after the expiration of the thirty-day period allowed for appeal from that order by Section 25(a) of the Bankruptcy Act, and that the order appealed from of May 28, 1936, as well as the order of May 12, 1936, which set aside the order of March 2nd, was therefore void. Per Curiam opinion (R. 58); *Wayne United Gas Company* v. *Owens-Illinois Glass Company et al.*, (C. C. A. 4th) 84 F. (2d) 965.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In holding that the District Court was without power to grant a rehearing and set aside its order of March 2, 1936, after the expiration of the period allowed for appeal from that order; and in consequence thereof in further holding,

(a) That the order of the District Court appealed from, entered May 28, 1936, upon rehearing, as well as that court's order of May 12, 1936, setting aside its order of March 2nd, was void;

(b) That the effect of these orders was merely to extend the time for appealing from the order of March 2nd;

(c) That petitioner's appeal from said order of May 28th should be dismissed as though it had been taken from the order of March 2nd; and

(d) That the cases cited in its opinion furnish authority for such procedure.

(2) In dismissing said appeal.

SUMMARY OF ARGUMENT

The question is narrow and a summary of the argument is contained in the Subject Index, ante, page I.

ARGUMENT

I.

A FEDERAL DISTRICT COURT HAS POWER TO SET ASIDE A FINAL JUDGMENT OR DECREE WHICH IT HAS MADE AND TO GRANT A REHEARING AFTER THE EXPIRATION OF THE PERIOD ALLOWED FOR APPEAL THEREFROM.

In cases at law or in equity the only limitation upon this power is that it must be exercised, or applcation for rehearing made, during the term at which such judgment or decree was entered.

It is clear, we submit, under the federal decisions that an unsuccessful litigant in a district court may exercise either of two rights to obtain a review of its judgment or decree against him: (1) He may appeal to the proper appellate court, usually the circuit court of appeals, within the time prescribed by the appropriate federal statute for such appeal; or (2) he may apply to the district court which made the judgment or decree of which he complains to set it aside and grant him a rehearing, within the period prescribed by appropriate rules of practice or decisions of the federal courts for such review.

The limitation imposed by law for taking the one or the other of these two courses is not the same. It has long been settled that a party seeking review of either a judgment at law or a decree in equity may for good cause shown have such judgment or decree set aside

and a new trial or rehearing of the matters adjudicated thereby granted him by the district court after the period of three months from the entry thereof prescribed by the federal statute for appeal to a circuit court of appeals (Act of February 13, 1925, c. 229, sec. 8(c), 43 Stat. 940; 28 U. S. C. A. Sec. 230) has expired, provided application is made to the district court and entertained by it at the same term at which such judgment or decree is entered. Equity Rule 69; *Memphis* v. *Brown*, 94 U. S. 715, 718. This right is "in no way controlled by the fact that the time for appeal has expired." *Northwestern P. S. Co.* v. *Pfeifer*, (C. C. A. 8th) 36 F. (2d) 5, 8. If the district court, in the exercise of a sound discretion, grant the application to review its own order and to this end sets aside such order, its judgment or decree made upon the rehearing becomes the final order in the case, and the time for taking an appeal runs not from the date of the original order, but from the date of entry of the order made upon rehearing. *Aspen Mining Co.* v. *Billings*, 150 U. S. 31, 36; *Clarke* v. *Hot Springs Electric L. & P. Co.*, (C. C. A. 10th) 76 F. (2d) 918, 921. A party who permits the time for appeal to expire before applying to the district court for rehearing, even though this be done within the term, takes the risk of losing all remedy by appeal; for if the district court, in its discretion, deny his motion (at law) or his petition (in equity) for a new trial or a rehearing, no appeal lies from its order. *Roemer* v. *Neumann*, 132 U. S. 103, 106; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675,

680. And the mere filing of the motion or petition, after the time for appeal has expired, does not toll the limit prescribed by statute for taking the appeal. *Chicago M. & St. P. Ry. Co.* v. *Leverentz*, (C. C. A. 8th) 19 F. (2d) 915, 917. The Circuit Court of Appeals for the Eighth Circuit, in the case last cited, in dismissing an appeal taken from an order of the district court *denying a new trial*, made after the expiration of three months from the entry of its final judgment, quoted with approval the following holding of the district court sustaining the power of that court to entertain a motion for rehearing after the time for appeal had expired:

> "Notwithstanding a defeated party may have lost the right to bring error, he may, under the rules, still have the right within the term to make a motion for a new trial, and to have the benefit of the court's judgment thereon. If the court shall grant the motion, a new trial will follow. If the court shall deny the motion, there is no remedy. The privilege of presenting a motion for a new trial and of having it heard and determined on its merits, *even after the time within which to sue out a writ of error has expired, is a valuable right.* There is no authority for denying it in this case. The motion for a new trial should, therefore, be considered on its merits."[a]

And in *Clarke* v. *Hot Springs Electric L. & P. Co.*, *supra*, the Circuit Court of Appeals for the Tenth Cir-

[a] All italics in this brief are ours.

cuit, considering a petition for rehearing that had been filed in the district court after the time for an appeal had expired and had been allowed in part, said (page 921):

> "* * * A petition for rehearing cannot resurrect a right of appeal which has expired. If filed within the term, *even after the time for appeal has expired*, the trial court may grant it, thus vacate the decree, and start again. But if the rehearing is denied, the original decree stands, and the rights of appeal is not revived. All this has been carefully spelled out by the courts." (Citing *Conboy* v. *First Nat'l Bank*, 203 U. S. 141, and other authorities).

In *Northwestern Public Service Co.* v. *Pfeifer*, *supra*, a motion for a new trial was made more than three months after the judgment was entered, but during the judgment term. The motion was overruled and the new trial denied by an order entered after the judgment term had ended. An appeal was taken from this order denying the new trial. Following the Leverentz case, the Circuit Court of Appeals for the Sixth Circuit again clearly recognized the power and jurisdiction of the district court to entertain the motion for the new trial after the time for an appeal had expired. It said:

> "This motion was 'entertained' by the trial court as it heard arguments and ruled thereon. Also the motion was 'seasonably filed' (being within the judgment term) *insofar as giving the*

trial court jurisdiction to consider and to act thereon." (p. 7).

And further:

> "Appellant had a right during the judgment term to file such motion. *Payne* v. *Garth*, 285 F. 301. This right was in no way controlled by the fact that the time for appeal had expired." (p. 8, citing the Leverentz case).

The court thus summarized the differing consequences of a rehearing applied for before the time for appeal has expired and an application made after the expiration of such period in *Larkin Packer Co.* v. *Hinderliter Tool Co.*, (C. C. A. 10th) 60 F. (2d) 491, 493:

> "Where a motion for a new trial or a petition for rehearing is a matter of right, time is tolled by the filing thereof. *Kingman* v. *Western Mfg. Co.*, 170 U. S. 675, 18 S. Ct. 786, 42 L. Ed. 1192; *Payne* v. *Garth*, (C. C. A. 8) 285 F. 301. *Where not a matter of right, or where the petition is informal, time is tolled if the court considers or entertains the petition.*"

Upon the authority of the decisions above referred to, the District Court for the Eastern District of Virginia, in a carefully considered opinion by Judge Chestnut, has recently held that a petition for rehearing filed in an equity case within the judgment term, but after the expiration of the three months allowed for an

appeal, may be considered,—that it was still within the *power* of the court to grant a rehearing. Upon this point the court said:

> "Therefore, irrespective of whether the time for appeal has expired and may not be extended by the filing of this petition and the present disposition thereof (a question not before me and on which I express no opinion), I have felt it proper to consider the petition on its merits, as it is at least discretionary with me to do so. See *Chicago, M. & St. Paul Ry.* v. *Leverentz*, (C. C. A. 8) 19 F. (2d) 915; *Northwestern Pub. Serv. Co.* v. *Pfeifer*, (C. C. A. 8) 36 F. (2d) 5; *Bailey* v. *Crump*, (C. C. A. 4) 41 F. (2d) 733; *Morse* v. *United States*, 270 U. S. 151, 154, 46 S. Ct. 241, 70 L. Ed. 518; *Burnet* v. *Lexington Ice Co.*, (C. C. A. 4) 62 F. (2d) 906."

The District Court, upon consideration of the petition for rehearing, concluded in the exercise of its discretion that it did not make a proper case for rehearing and refused to grant it. *United States* v. *McIntosh*, (D. C.) 3 F. Supp. 715. An appeal was taken from the order denying the rehearing. The Circuit Court of Appeals for the Fourth Circuit, following the well-settled rule in such cases, dismissed the appeal upon the ground that no appeal lies from an order *denying* a petition for rehearing and that the mere filing of the petition after the expiration of the three-month period does not restore the right of appeal. *McIntosh* v. *United States*, (C. C. A. 4th) 70 F. (2d) 507.

It is equally well settled that the rule is different where the rehearing is granted instead of denied. Thus, in overruling a motion to dismiss an appeal, the Circuit Court of Appeals for the Eighth Circuit held in *Todd* v. *Alden*, (C. C. A. 8th) 245 Fed. 462:

> "Where, after an order allowing a claim in bankruptcy, a rehearing is *granted*, the time for taking an appeal is extended, and runs from the time the order is made final."

The *power* or *jurisdiction* of the District Court to set aside its judgment or decree and grant a rehearing after the time prescribed for appeal therefrom has expired, upon timely application, cannot, we submit, reasonably be doubted. This power has frequently been exercised in bankruptcy proceedings, as shown by the cases subsequently cited.

II.

THERE ARE NO TERMS IN BANKRUPTCY.

A district court sitting in bankruptcy may set aside any order made by it and grant a rehearing of the matters adjudicated thereby, provided (1) the application for review is seasonably made, and (2) rights have not become vested under the order which will be disturbed by its vacation.

When Congress passed the first Bankruptcy Act of 1800, it conferred upon the district courts the administration thereof. (2 Stat. 19). This jurisdiction of

the district courts has been continued in the successive Acts of 1841, 1867 and 1898. Since bankruptcy is a purely statutory creation, and fundamentally at variance with common law principles, it was early recognized that many rules of procedure which had their origin in the common law had no application to bankruptcy proceedings. Thus it was early decided that the district courts sitting in bankruptcy knew no terms, and accordingly their power over their own proceedings was unaffected by rules or principles which limited the power of the same courts sitting at law or in equity to review their own orders, to action within prescribed terms of the court.

It does not follow, of course, that no limitation is imposed by federal law upon the power of the district court sitting in bankruptcy to grant rehearings. The limitation, as early stated by this court and consistently followed, is that the rehearing must be granted upon application seasonably made, and that it must appear that rights have not become vested under the order sought to be reviewed which will be disturbed by its vacation. It has never been held, so far as we can find, that application for a rehearing in bankruptcy must be made at the same term of court at which the order sought to be reviewed was entered.

We are concerned here with the narrow question of the power of the District Court to review its order dismissing a "petition for corporate reorganization under Section 77-B of the Bankruptcy Act as amended"

(Opinion of Circuit Court herein, R. 58; 84 F. (2d) 965), after the time for appeal from that order had expired,—and after the term at which the order was entered had ended. In a former opinion in this case rendered April 15, 1936, denying petitioner an appeal under Section 24(b), the same court held that the order of the District Court (of March 2, 1936) dismissing said petition for reorganization is "the equivalent for procedural purposes of a judgment refusing to adjudge petitioner a bankrupt." *Wayne United Gas Co.* v. *Owens-Illinois Glass Co. et al.*, (C. C. A. 4th) 83 F. (2d) 98. The question now under consideration is whether the District Court, sitting in bankruptcy, has *power* to review this order after a new term of court has commenced.

We think the applicable principle was thus stated in *Sandusky* v. *National Bank*, 23 Wall. 289, 293 (1874):

> "A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt, is but one suit. The district court, for all the purposes of its bankruptcy jurisdiction, is always open. *It has no separate terms.* Its proceedings in any pending suit are, therefore, at all times open for reexamination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

While this case arose under the Act of 1867, this language has been held to be equally applicable to the present Bankruptcy Act. *In re Lemmon & Gale Co.*, (C. C. A. 6th) 112 Fed. 296, 300; *In re Ives*, (C. C. A. 6th) 113 Fed. 911, 913.

Quoting and applying this language of the Sandusky case, the Court of Appeals for the Second Circuit in *In re Rochester Sanatarium & Baths Co.*, (C. C. A. 2nd) 222 Fed. 22, 26, held:

> "There are no terms of court in bankruptcy, so that an adjudication of bankruptcy, it is held, may be vacated after the expiration of the term wherein it was entered."

The same court in *In re Burr Mfg. & Supply Co.*, (C. C. A. 2nd) 217 Fed. 16, 18, upon a petition to review and revise the action of the district court in setting aside an order confirming a sale and an order confirming a resale held pursuant to the before-mentioned order, attacked upon the ground that the court had no power to set aside the order confirming the sale after the term had ended at which it was entered, held:

> "The confirmation order having been made at one term, and the order vacating it made at another term presided over by another judge we are asked to hold that the court had no power to vacate its order upon the theory that, after the expiration of the term in which an order, judgment or decree is made, errors can be corrected only by an appellate court * * *

> "It is of course true that as a general rule the power of the court to modify its orders expires with the term. But there are no terms in bankruptcy, and the principle which the learned counsel invokes that a court has *no power* to vacate its order other than at the term in which it was granted is inapplicable to the facts of this case,"—quoting the opinion of Chief Justice Waite in the Sandusky case, above.

In *Freed* v. *Central Trust Co.*, (C. C. A. 7th) 215 Fed. 873, it was held that the common law rule that a bill of exceptions must be filed within the term has no application in bankruptcy proceedings. The court, after holding that a writ of error which the district court had awarded Freed, a bankrupt, (to review an order committing him for contempt) should be treated as a petition to revise under Section 24(b) of the Bankruptcy Act, in overruling appellee's motion to strike a bill of exceptions allowed after the judgment term had ended, said:

> "While, at common law, a bill of exceptions must be filed within the term or within such time as may be granted during the term, this rule can have no application in bankruptcy proceedings. The District Court, sitting as a court of bankruptcy, has no terms. * * *" (p. 876).

It is said to be settled law that "an adjudication of bankruptcy may be vacated after the expiration of the term of court wherein entered," for the reason that there are no terms of court in bankruptcy.

In re Ives, (C. C. A. 6th) 113 Fed. 911, 913;
In re Keyes, (D. C. Mass.) 160 Fed. 763, 764;
In re Wright, (D. C. Mass.) 96 Fed. 820.

Compare: *In re Worchester County*, (C. C. A. 1st) 102 Fed. 808, at page 811.

Other authorities for this proposition are collected at Remington on Bankruptcy, Section 502; Id., Sections 1067 and 3859.

It fairly follows, we submit, from the principles announced and applied in these cases that the *power* of a court of bankruptcy to set aside any order made by it in a bankruptcy proceeding is not lost or destroyed by the expiration of the term of court at which the order was made. The power to vacate the order survives the term. Whether the court should exercise the power is to be determined by the exercise of a sound judicial discretion. If it appears that the petitioner has not been guilty of laches,—if his application has been promptly made,—and if it further appears that there has been no change in the situation of the parties affected by the former order which would make it inequitable to set it aside, that is to say, as stated in Sandusky case, if petitioner can make a proper showing of cause for reconsideration of the former order and "rights have not become vested under it which will be disturbed by its vacation,"—the district court may properly set aside any order made by it in the bankruptcy proceeding. The nature of the order sought to be reviewed, whether final or interlocutory,

does not limit or destroy the power of the court. It has the same power to set aside an order denying an adjudication of bankruptcy as one making such adjudication. In both instances the bottom question is not one of power, but of sound judicial discretion.

It is submitted that the action of the District Court in the case at bar is sustained by the doctrine of the Sandusky case and the line of federal decisions which has followed it. Although petitioner's application for rehearing was made after the time for appeal from the court's original order of March 2nd had expired, and within a few days after the term ended, the District Court found: (1) that petitioner's application and motion "have been properly and seasonably presented in this cause," and (2) that "no rights have become vested under said order or decree entered herein on March 2, 1936, which will be disturbed by the vacation of said order or decree" (R. 18).

Neither of these findings has been or can be challenged.

Supplementing the foregoing propositions, it is respectfully submitted:

(1) The decision of the Circuit Court of Appeals for the Fourth Circuit that the District Court, sitting in bankruptcy, had no power to set aside its order of March 2, 1936, and grant a rehearing after the expiration of the period allowed for appeal from that order, is contrary to the weight of authority and in conflict with decisions of the Circuit Courts of Appeals for the Sixth, Eighth and Second Circuits on the same matter and to the rule recognized in the Third Circuit.

The Circuit Court has decided an important question of federal practice in a way in conflict with applicable decisions of this Court.

1. *West* v. *McLaughlin's Trustee,* (C. C. A. 6th) 162 Fed. 124, 125.

In this case a rehearing was granted by the District Court after the time for appeal from a final order, under Section 25(a) of the Bankruptcy Act, had expired. The District Court upon the rehearing reached the same conclusion it had reached upon the former hearing, and for the second time entered an order approving the finding of the referee disallowing West's claim against the bankrupt estate for $5,000.00. An appeal was taken from the order entered upon the rehearing. The Circuit Court of Appeals overruled appellee's motion to dismiss the appeal and heard the case upon the merits, reversing the decree of the District Court. After stating that it could not accept the contention sustained by some decisions[*] that it would not be an *abuse of the discretion* of the District Court to set aside an order for the *sole purpose* of extending the time for an appeal, the Circuit Court of Appeals

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[*] There is substantial authority for the proposition that a District Court may set aside its order and grant a rehearing for the sole purpose of restoring a right of appeal which has been lost without culpable neglect by expiration of the period limited for taking it. *Stickney* v. *Wilt,* 23 Wall. 150, 164; *Memphis* v. *Brown,* 94 U. S. 715, 718; *In re Hudson Clothing Co.,* (D. C. Me.) 140 Fed. 49, 50; *In re Wright,* (D. C. Mass.) 96 Fed. 820; *In re American S. S. Nav. Co.,* (D. C. Pa.) 14 F. Supp. 106, affirmed in *Cooper* v. *Rauch,* (C. C. A. 3rd) 82 F. (2nd) 1005; Remington on Bankruptcy, Sec. 1069.

held it to be settled law that the District Court had the power, in the exercise of a sound judicial discretion, to set aside its orders in bankruptcy "even after the expiration of ten days" then allowed for appeal therefrom by Section 25(a) of the Bankruptcy Act. Continuing, it said:

> "The record shows that it was not a mere proposition to evade Section 25(a) that induced the court below to set aside its order in this instance, but that it was done in order to have further investigation, and the learned judge of the District Court not only reaffirmed the questions involved, but more elaborately stated his views thereon. *The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him.* Having reached the conclusion that there was no abuse of the court's discretion in granting the rehearing, the motion to dismiss the appeal will be denied."

The same essential facts stated in the above quotation from the West case are present here. It is certainly true in the case at bar that the judge of the District Court "more elaborately stated his views" upon the rehearing of May 28th than upon the original hearing of March 2nd. It is as true here as in the West case that "the fact that he (the District Judge) again arrived at the same conclusion" upon the rehearing as upon the original hearing "did not neutralize his power to grant the rehearing." It is, of course, as

impossible here as it was in the West case to negative the argument that "some concession to the supposed hardship of the case may have had weight with him." But granting this, there is ample justification here, as there, for holding "that there was no abuse of the court's discretion in granting the rehearing."

The same court in *In re Ives*, (C. C. A. 6th) 113 Fed. 911, 913, upon a motion to vacate a voluntary adjudication of bankruptcy made several terms after the order of adjudication had been entered, held that the rule that orders of the court pass beyond the power of the court to vacate or amend with the end of the term at which they were made, does not apply to orders made in bankruptcy proceedings. The court noted that Section 2 of the Bankruptcy Act contemplates that a court of bankruptcy, like surrogate and probate courts where estates are administered, has no terms. It further held that the rule of this court announced in the Sandusky case, decided under the Act of 1867, is applicable to the current Act of 1898. Its conclusion upon this point was: "We are of opinion, therefore, that the question presented by the petition was open and the court below had power to determine it, although several terms of the district court had expired since the adjudication."

2. *Cameron* v. *National Surety Co.*, (C. C. A. 8th) 272 Fed. 874, 875.

The District Court, on July 1, 1920, set aside its order entered May 17, 1920, adjudging appellant a

bankrupt upon motion made after the time for taking an appeal from the original order (then ten days) had expired. In overruling a motion to dismiss the appeal the court said:

> "* * * The petition to vacate the order of May 17, 1920, was filed June 1, 1920. It is therefore claimed that, the petition to vacate not having been filed within the time allowed for an appeal from the first order, and the *order appealed from being the same as the first order*, the time for taking an appeal had expired when the present appeal was taken. We think that this contention is unsound, in view of the record before us. The order of June 1, 1920, provided that the order of May 17, 1920, 'be and the same is hereby in all things set aside.' The order of August 19, 1920, from which the appeal was taken, does not affirm the order of May 17, 1920, nor refer to it, but is an independent order made upon the pleadings and proofs; so we are of the opinion that on the record as it stands, the order appealed from was the only order in existence and that the time for taking an appeal ran from its date. The appeal was allowed August 20, 1920. The order vacating the first order was not appealed from and is conclusive on this appeal. *We therefore have jurisdiction. Todd* v. *Alden*, 245 Fed. 462, 157 C. C. A. 624."

The District Court in this case held that the appellant, who was the widow of a deceased partner, was a member of the partnership and adjudged the part-

nership and all of its members bankrupt. The Circuit Court, after overruling the motion to dismiss the appeal, considered the case upon the merits and modified the order of the District Court so as to exclude the appellant from the partnership.

3. *In re Rochester Sanitarium & Baths Co.*, (C. C. A. 2nd) 222 Fed. 22, 26.

Here the Circuit Court of Appeals for the Second Circuit, upon petition to superintend and revise an order granting a rehearing entered long after the time for appealing from the original order had expired and after the term of court at which it was entered had ended, noting that the power to vacate judgments is inherent in courts of general jurisdiction, said:

> "But the power is to be exercised by the court which rendered the judgment, and none other can take cognizance of the application. And a motion to set aside a judgment is addressed to the sound legal discretion of the court, and its determination of the matter is not disturbed on appeal *unless it is plain that its discretion has been abused.* The greater power includes the less, and the common-law rule is that a court has entire control over its own orders, and may vacate them at any time during the term at which they are made. (Citing authorities). There are no terms of court in bankruptcy, so that an adjudication of bankruptcy, it is held, may be vacated after the expiration of the term wherein it was entered." (Quoting the language

of the Sandusky case, quoted at page 17 hereof, ante).

To the same effect is:

Todd v. *Alden*, (C. C. A. 8th) 245 Fed. 462, *supra.*

4. It is held in the Third Circuit not only that a federal district court sitting in bankruptcy has general power to grant a rehearing and upon such rehearing to vacate, modify or reaffirm its prior decree after time for taking an appeal has expired and the term at which the decree was entered has ended (upon the authority of the Sandusky case), but also that the granting of a rehearing for the purpose of reviving a right of appeal, where the petitioner has some excuse for not having taken it within the statutory period, is a valid exercise of the discretion vested in the court to grant a rehearing. *In re American S. S. Nav. Co.*, (D. C. E. D. Pa.) 14 F. Supp. 106, 108. After granting the rehearing, the District Court entered an order reaffirming its original decree, which had overruled the referee and allowed the claim of a creditor, Rauch. Upon appeal from the order entered upon the rehearing, the Circuit Court of Appeals for the Second Circuit affirmed the District Court in a *per curiam* opinion. *Cooper* v. *Rauch*, (C. C. A. 2nd) 82 F. (2d) 1005.[5]

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[5] A prior appeal taken by the petitioner in this cause after the statutory period had elapsed by the reentry nunc pro tunc of the order overruling his objections to the claim of Rauch had been dismissed by said Circuit Court of Appeals. (14 F. Sup. at p. 108).

5. It is submitted that the action of the Circuit Court of Appeals in the case at bar is in conflict with the ruling of this court in *Zimmern* v. *United States*, . . . U. S. . . ., 80 L. ed. 742, in which this court reviewed and reversed a ruling of the Circuit Court of Appeals for the Fifth Circuit in order to avoid confusion upon a related question of practice.

The District Court in the Zimmern case, which was a proceeding in equity to cancel certain deeds, extended a term of the court for the avowed purpose of modifying or amending its final decree. One of the defendants filed a petition for rehearing when the time to appeal had already gone by, if the original decree was then presently in force (p. 743). The Circuit Court dismissed the appeals upon the ground that

> "Motion for rehearing filed in trial court *after expiration of three months from final decree came too late*, and was ineffective to extend time for taking appeal." *Zimmern* v. *United States*, (C. C. A. 5th) 79 F. (2d) 703.*

In reversing the Circuit Court, this court said that under the applicable statute (U. S. C. A., Title 28, Sec. 230) the appeals of the defendants were too late if the time is to be computed from the date of the decree as originally entered, but they were regular if the time is to be computed from the date of the argument, adding:

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* Rehearing denied, 80 F. (2d) 993.

"The judge had plenary power while the term was in existence to modify his judgment for error of fact or law, or even revoke it altogether."

(2) It is respectfully submitted that the decisions cited by the learned Circuit Court of Appeals for the Fourth Circuit do not sustain its proposition "that the court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order." (Opinion, R. 58).

Three cases are referred to as sustaining this holding, namely:

1. *United States* v. *East*, (C. C. A. 8th) 80 F. (2d) 134, 135.

In this case some three months after the claim of the Government against the bankrupt's estate for taxes had been denied by the District Court, the Government filed a petition to review the order denying its claim on the ground that a rehearing was necessary to enable it to take an appeal in the event it should decide to do so. The Government's petition was presented *ex parte* and granted the same day it was tendered. The District Court in its order made the finding that "on January 13, 1913, upon petition filed on that day, the court granted a rehearing *for the purpose of enabling the United States of America to perfect an appeal to the Circuit Court of Appeals.*" By the same order the

District Court again disallowed the claim of the United States against the bankrupt. Upon this record the Circuit Court of Appeals for the Eighth Circuit dismissed the appeal taken by the Government from the order of January 13, 1913, holding that the purpose of the proceeding was an ineffectual effort to extend the time for an appeal.

This record is essentially different from the record in the instant case. So far from the record here showing that the rehearing was granted by the District Court for the sole purpose of enabling petitioner to perfect an appeal, the record is that the rehearing was granted in order to enable the court more fully to consider the correctness of its former decision upon difficult questions in the light of the assignments of error specifying errors complained of by petitioner.

In the East case the order granting the rehearing was made *ex parte* without argument of counsel and without any reason being assigned by petitioner or considered by the court except the Government's necessity that the former order be set aside and reentered in order to enable it to take an appeal. This is not the case disclosed by the present record. It is submitted that the instant case is ruled not by the East decision, but by the decision of the same court (C. C. A. 8th) in *Cameron* v. *National Surety Co., supra.*

2. *Bonner* v. *Potterf*, (C. C. A. 10th) 47 F. (2d) 852, 855.

The point ruled in this case is not that the trial judge lacked power to grant a rehearing after the expiration of the appeal period, but that his action was "beyond the sound discretion of the court."

On January 17, 1929, the District Court entered an order overruling Bonner's exception to the report of a referee denying his claim against the bankrupt's estate. On March 28th, after the thirty-day period for appeal had expired, Bonner filed a petition to reopen the case, which also asked the court to reenter its final order of January 17th so that in the event the court should hold against his contention, he might appeal from that judgment to the Circuit Court of Appeals (p. 853). The District Court denied the petition for rehearing, but directed the reentry of its original order. This was done on November 6th and an appeal therefrom taken the same day. The District Court made the following finding:

> "I find that the motion of W. M. Bonner to reopen this case should be overruled and an order to that effect will be entered at Muskogee on November 6, 1929. The order of January 17, 1927, overruling exceptions will be reentered on November 6, 1929, (so) as to give Bonner opportunity to appeal the test question as to whether it is final order, etc., and seek a review on order of court overruling exceptions." (p. 853).

In sustaining a motion to dismiss the appeal from this order, the Circuit Court held that it conclusively appeared from the record that the trial judge merely attempted to reenter the original order for the purpose of allowing an appeal from it, the new order incorporating the old one, and that it did not appear that the trial judge in any way reconsidered his former action in making the new order. Its conclusion was:

> "It is therefore apparent that this action of the court was simply a reentry of the original order for the sole purpose of saving the rights of the appellant in regard to appeal which, under such circumstances, *is a matter beyond the sound discretion of the court, and amounts to an ineffective gesture to revive the right to appeal.*" (p. 855).

It is noteworthy that the Circuit Court, in discussing the applicable legal principle, quotes with approval the holding of the Circuit Court of Appeals for the Sixth Circuit in *West* v. *McLaughlin's Trustee* (ante p. 22) that a court has the power "even after the expiration of the time within which to appeal, in the exercise of its sound discretion, (to) grant a rehearing" (p. 854). It is clear that the decision in this case turned not upon the lack of power in the District Court to grant a rehearing, but on an abuse of its discretion in the exercise of that power under the facts of the case.

3. *In re Stearns & White Co.*, (C. C. A, 7th) 295 Fed. 833.

Here the bankrupt, Stearns & White Co., on April 12th, moved the District Court to vacate orders entered by it on February 3rd and 28th allowing a claim against it for approximately $17,000.00 in favor of a creditor, Lee. The motion was made for the express purpose of reinstating the right of appeal from said orders, which had been lost by failure of the bankrupt to perfect an appeal which had theretofore been duly prayed and allowed (p. 834). The court by an informal *ex parte* order entered on the same day, April 12th, vacated its two prior orders, again denied the bankrupt relief, and again affirmed the action of the referee allowing Lee's claim. This action was taken solely for the purpose of restoring the right to appeal. This appears clearly from the District Court's order of April 12th, reading as follows:

> "Orders of February 3d and 28th vacated—petn. of Stearns & White to review order of F. L. Wean, Referee, of July 11, 1922, denied—order of Referee affirmed." (p. 834).

The record in the Stearns & White case was substantially the same as that in the East and Bonner cases. In all three the record showed that the rehearing was applied for and granted *ex parte*, without consideration of the merits of the motion or the possibility of error in the court's former order, for the sole purpose of restoring a lost right of appeal.

However in the Stearns & White case the court, in dismissing the appeal, went further than was necessary to the decision of the question presented and said that the District Court was without "jurisdiction" to grant the rehearing,—instead of grounding its judgment upon an erroneous exercise of discretion by the District Court in granting the rehearing, as in the East and Bonner cases. In this respect the learned court, it is submitted, proceeded upon a misconception of the holding of this court in *Conboy* v. *First National Bank*, 203 U. S. 141, by saying:

> "The Conboy case very conclusively holds that where there is no petition for rehearing or other action taken within the time allowed for the appeal, nothing done thereafter can be of any avail." (p. 840).

All that the Conboy case decided was that the *mere filing* in a Circuit Court of Appeals of a petition for rehearing which was *denied* did not extend the time for taking an appeal to this court from the order of the Circuit Court sought to be reviewed. By waiting until after the time for appeal had expired before applying for the rehearing, the petitioner took the risk of losing his right of appeal. If his petition for rehearing had been granted, the former order against him would have been superseded by the order granting the rehearing and the time for appeal would have run from the entry of the latter under authorities hereinbefore cited (ante, p. 15 et seq.). But where the petition for re-

hearing was denied (which was the result in the Conboy case), two consequences followed: (1) No appeal could be taken from the order denying the rehearing because the allowance thereof was discretionary with the Circuit Court of Appeals to which the application was addressed; and (2) the mere application for a rehearing did not enlarge the time for taking an appeal from the original order. That this is the substance of the ruling in the Conboy case appears from the court's holding therein:

> "No appeal lies from orders *denying* petitions for rehearings which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors." (203 U. S. at p. 145).

The court in the Conboy case declined to decide what would have been the effect upon petitioner's right to appeal if his petition for rehearing had been *granted.* That it deliberately left this question open appears from the final paragraph of its opinion:

> "The petition was denied. Whether it could have been granted in view of the terms and spirit of the Bankruptcy Act, or the effect, if it had been, we are not called upon to discuss." (203 U. S. at p. 146).

There are a number of decisions which correctly apply the doctrine of the Conboy case by holding that no appeal lies from an order of the District Court

denying a motion to vacate a prior order and grant a rehearing where the motion is made after the time limited for taking an appeal from the first order has expired.[e] All these cases proceed upon the principle that if a party permit the time limited for his appeal to expire before moving to vacate the adverse order, the mere filing of his petition does not resurrect a dead right of appeal, and if the motion be denied, no appeal lies from the order denying the rehearing. This is not the situation presented by the record in the instant case.

The court in the Stearns & White case also expressed the opinion that the ruling in the Sandusky case, decided under the Act of 1867, is not applicable to cases arising under the Act of 1898 because of what it regards as important differences in the provisions of the two Acts. This is not the view taken by other Circuit Courts of Appeals. *In re Lemon & Gale Co.*, (C. C. A. 6th) 112 Fed. 296, 300; *In re Ives*, (C. C. A. 6th) 113 Fed. 911, 913.

There is no discussion of terms of court in the Stearns & White opinion. The holding of the court is that in no event can a petition for reconsideration of an order of the court allowing a claim against the

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[e] These include such cases as *Morgan* v. *Benedum*, (C. C. A. 4th) 157 Fed. 232; *McIntosh* v. *United States*, (C. C. A. 4th) 70 F. 507; *Rode & Horn* v. *Phips*, (C. C. A. 6th) 195 Fed. 414; *Ewing* v. *Russell Hdwe. Co.*, (C. C. A. 8th) 287 Fed. 545; *Foster* v. *McMasters*, (C. C. A. 8th) 15 F. (2nd) 751.

estate of a bankrupt be considered unless a petition for reconsideration has been filed within ten days after the entry of the order, except in the single case provided for by Section 57(k) of the Bankruptcy Act, allowing a reconsideration for cause.[7] If, as our adversaries argue, the ratio decedendi can be extended to embrace all other orders entered by the bankruptcy court, then this holding is in direct conflict with the numerous decisions hereinbefore cited.

In the *American S. S. Nav. Co.* case, ante, the court reviewed at some length the authorities dealing with the question of its power to grant a rehearing after the time for appeal had expired and the judgment term had ended, reaching the conclusion that there was no doubt as to this power, upon the authority of the Sandusky case, and saying that it knew of no decision except the Stearns & White case denying this power:

> "Some of the cases cited above (*In re Hudson Clothing Co.*; *West* v. *W. A. McLaughlin Co.'s Trustee*) hold that discretion to grant a rehearing for the purpose of reinstating a lapsed right of appeal may be abused, but none of them except *In re Stearns & White Co.* deny the jurisdiction." (14 F. Supp. at p. 109).

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[7] Section 57(k) of the Bankruptcy Act provides: "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

(3) The District Court set aside its order of March 2, 1936, in the exercise of a sound judicial discretion and for good cause shown.

The District Court did not act upon petitioner's application without the benefit of full argument and after mature consideration. On April 24th, after due notice to respondents, petitioner filed its petition to set aside the order of March 2nd "because of error in said order or decree upon the grounds set forth in the assignment of errors presented herewith and attached hereto" (R. 7). This assignment of errors, found at pages 14-17 of the Record, points out specifically numerous respects in which petitioner conceived the District Court erred in holding that its petitions did not comply with the provisions of Section 77(b) of the Bankruptcy Act and were not filed in good faith within the meaning of said Act and in disapproving and dismissing said petitions. The court found, as set forth in its order made three weeks later, May 12th,

> "that good cause exists justifying this court, in the exercise of a sound judicial discretion, in setting aside, vacating and annulling the aforesaid order or decree entered by this court in the above styled proceeding on the 2nd day of March, 1936, and in granting to the said Wayne United Gas Company, the above named Debtor, a rehearing of all the issues and matters arising in the above styled proceeding *upon the alleged errors set forth in the assignment of*

errors presented with the aforesaid petition, and upon the record in this proceeding."[9]

Argument of the questions arising upon the rehearing was set by the same order for May 22nd. On that day the petitioner filed its second amended and supplemental petition for reorganization, amending its former plan in important respects more favorable to the first mortgage bondholders. The hearing on May 22nd, as shown by the order of the court entered thereon on May 28th, was in no sense perfunctory or merely formal. The court then had before it for the first time the amendments made by the Debtor's second amended and supplemental petition.[10] This order shows (R. 19)

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[9] The Circuit Court of Appeals for the Seventh Circuit has recently held, In re Georgian Hotel Corporation, 82 F. (2d) 917, 920 (March 31, 1936), that the fact that a receivership suit was pending in a state court, which had rendered a decree of foreclosure, did not deprive the bankruptcy court of jurisdiction of a reorganization proceeding under Section 77-B.

[10] No plan of reorganization was submitted with the Debtor's original petition filed November 25, 1935, which is found at pages 26-31 of the Record. In its amended and supplemental petition filed December 10, 1935, the Debtor undertook "promptly and within any reasonable time fixed by the court" to propose a plan of reorganization which in substance would provide for: immediate payment in cash of all arrears in interest and sinking fund payments and curing all defaults under the first mortgage; setting aside the acceleration of maturity of the first mortgage bonds (the due date of which was June 1, 1944), and remitting the first mortgage bondholders to their former position under the mortgage, without change; the payment of all taxes, fees and expenses of the receivers, costs of reorganization, etc.; providing such amount for working capital of the reorganized company as the court should deem necessary; cancellation of the second or general mortgage; exchange of the 7% gold notes of the company, which were secured by the general mortgage bonds, for 6% debentures or notes maturing subsequent to the first mortgage bonds, with no provision for sinking fund and with interest payable out of net earnings remaining after the requirements of the first mortgage and other specified

that the court went thoroughly and carefully into the merits of petitioner's motion to reverse its former action and approve its petitions. It made ten separate findings of law and fact in response to petitioner's assignment of errors in its former order. The court's conclusion, in view of its findings, was "to dismiss the Debtor's several petitions." It stayed the effect of its order for thirty days to enable the Debtor to appeal therefrom. The instant appeal was taken and perfected well within the thirty-day period, namely, on June 11, 1936 (R. 62).

It is submitted in these circumstances that the fact that the District Court upon rehearing reached the same ultimate conclusion that it had reached upon its former hearing on March 2nd does not destroy its power or jurisdiction to grant the rehearing. (*West* v. *McLaughlin's Trustee*, (C. C. A. 6th) 162 Fed. 124, 125, ante, p. 23).

Whether the District Court was right in its findings made and order entered upon the rehearing is a question not now presented. The sole question now before

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obligations of the company were fully met. This plan is found at pages 36-39 of the Record. The second amended and supplemental petition, tendered May 22nd, contained proposed amendments to the suggested plan, distinctly more favorable to the first mortgage bondholders, by providing for the waiver of a provision of the first mortgage for cumulating deductions from net earnings for capital expenditures, and by providing for applying the unused balance in any year for the benefit of the first mortgage bondholders; and by still further subordinating the payment of both principal and interest of the new money to the rights of the first mortgage bondholders.

this Court, upon the present writ, is whether the District Court had the power to grant the rehearing.

CONCLUSION

It is submitted that the Circuit Court of Appeals for the Fourth Circuit by its decision in the instant case has narrowed the power of the District Judge by imposing limitations, not recognized in other circuits, inconsistent with long established and widely recognized rules of federal procedure which have been approved by this court.

The decree should be reversed.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A

Sections 24 and 25, as amended, of the Bankruptcy Act of 1898, providing for appellate jurisdiction of controversies arising in bankruptcy proceedings and for appeals in proceedings in bankruptcy, are as follows:

"*Sec. 24.* (11 USCA Sec. 47). *Same (Jurisdiction); Appellate Jurisdiction.—a.* The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

"*b.* The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 25) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 25 to be allowed in the discretion of the appellate court.

"*c.* All appeals under this section shall be taken within thirty days after the judgment, or order, or other matter complained of, has been rendered or entered. (30 Stat. 553 (1898), as am'd, 43 Stat. 936, 937, 941 (1925), as am'd, 44 Stat. 664 (1926).)

"*Sec. 25.* (11 USCA Sec. 48). *Appeals and Writs of Error.—a.* Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia, and

to the supreme courts of the Territories, in the following cases, to-wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

"*b.* Trustees shall not be required to give bond when they take appeals or sue out writs of error.

"c. Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws in force on July 1, 1898, or such as may be thereafter enacted. (30 Stat. 553 (1898), as am'd, 43 Stat. 936, 941 (1925), as am'd, 44 Stat. 665 (1926).)"

APPENDIX B

Relevant parts of Section 77-B (Act of June 7, 1934, 48 Stat. 911, 912, c. 424, 11 USCA Sec. 207), are:

(Petition)

"*Sec. 77-B.* (11 USCA Sec. 207). *Corporate Reorganizations.*—(a) Any corporation which could become a bankrupt under section 4 of this Act * * * may file an original petition, or, before adjudication in an involuntary proceeding, an answer, * * * stating the requisite jurisdictional facts under this section; the nature of the business of the debtor; in brief description, the assets, liabilities, capital stock, and financial condition of the debtor; if a prior proceeding is pending, the name of the court in which it is pending and the nature of such proceeding; facts showing the need for relief under this section; and that the corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. * * * Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. * * *

(Plan)

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise; (3) shall provide for the payment in cash of all costs of administration and other allowances made by the court except etc. * * * (4) (relates only to stockholders); (5) shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan (unless the claims of such class of creditors will not be effected by the plan, or the plan makes provision for the payment of their claims in cash in full), provide adequate protection for the realization by them of the value of their interests, claims, or liens, if the property affected by such interests, claims,

or liens is dealt with by the plan, either as provided in the plan (a) by the transfer or sale of such property subject to such interests, claims, or liens, or by the retention of such property by the debtor subject to such interests, claims, or liens, or (by sale or appraisal or other method approved by the judge) * * *; (9) shall provide adequate means for the execution of the plan, which may include * * * the retention of the property by the debtor, the distribution of assets among creditors or any class thereof, the satisfaction or modification of liens, indentures, or other similar instruments, the curing or waiver of defaults, extension of maturity dates of outstanding securities, the change in interest rates and other terms of such securities, the amendment of the charter of the debtor, and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; * * *

* * * * *

"(10) * * * In the case of secured claims entitled to the provisions of clause (5) of this subdivision (b), the value of the security shall be determined in the manner provided in section 57, clause (h) of this Act, and if the amount of such value shall be less than the amount of the claim, the excess may be classified as an unsecured claim. * * *

(Hearing on Plan)

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him, (1) may, after hearing upon notice to the debtor and to such others as the judge may determine temporarily continue the debtor in possession or appoint a trustee or trustees of the debtor's estate, and shall require the debtor, or such trustee or trustees, if appointed, to give such notice as the order may direct to creditors and stockholders and to cause publication thereof to be made at least once a week for two successive weeks of a hearing to be held within thirty days after such appointment, or, if no such appointment, within thirty days after the approval of the petition or answer, at which hearing or any adjournment thereof, or at any subsequent hearing after notice, the judge may make permanent any such appoint-

ment, or terminate it and restore the debtor to possession, * * * (4) shall require the debtor, or the trustee or trustees if appointed, at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; * * * (6) * * * and may * * * classify as an unsecured claim, the amount of any secured claim in excess of the value of the security therefor, such value to be determined in accordance with the provisions of section 57, clause (h), of this Act; * * * (8) if a plan of reorganization is not proposed or accepted within such reasonable period as the judge may fix, or, if proposed and accepted, is not confirmed, may, after hearing, whether the proceeding be voluntary or involuntary, either extend such period or dismiss the proceeding under this section * * * (10) may enjoin the * * * continuance of any judicial proceeding to enforce any lien upon the estate until after final decree. * * * Any creditor or stockholder shall have the right to be heard on the question of the permanent appointment of any trustee or trustees, and on the proposed confirmation of any reorganization plan, and upon filing a petition for leave to intervene, on such other questions arising in the proceeding as the judge shall determine. * * *

* * * * *

(Acceptance of Plan by Creditors)

"(e) (1) A plan of reorganization shall not be confirmed until it has been accepted in writing, whether before or after the filing of the petition or answer under this section, and such acceptance shall have been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan and by or on behalf of stockholders of the debtor holding a majority of the stock of each class: Provided, however, That such acceptance shall not be requisite to the confirmation of the plan by any creditor or class of creditors (a) whose claims are not affected by the plan, or (b) if the plan makes provision for the payment of their claims in cash in full, or (c) if provision is made in the plan for the protection of the interests, claims, or liens of such creditor or

class of creditors in the manner provided in subdivision (b), clause (5), of this section: * * *

* * * * *

(Confirmation of Plan)

"(f) After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that (1), it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; (2) it complies with the provisions of subdivision (b) of this section; (3) it has been accepted as required by the provisions of subdivision (e), clause (1) of this section; (4) the provisions of subdivision (e), clause (2) (relating only to utilities), of this section have been complied with; (5) all amounts to be paid by the debtor * * * for service or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of the judge; (6) the offer of the plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by this Act; and (7) the debtor, * * * is authorized by its charter or by applicable State or Federal laws, upon confirmation of the plan, to take all action necessary to carry out the plan, * * *.

* * * * *

(Receiverships)

"(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a * * * State * * * court, * * * a petition or answer may be filed under this section at any time thereafter by the corporation * * * as provided in subdivision (a) of this section, and if such petition or answer is approved the trustee * * * or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to said property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver, etc. * * *

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(Application of other Provisions of Bankruptcy Act)

"(k) * * * All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to

'debtors'; 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication.

* * * * *

"(o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."